

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

1 THE CIRCLE, SUITE 2  
SUSSEX COUNTY COURTHOUSE  
GEORGETOWN, DE 19947

Caroline Burton  
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Katisha D. Fortune, Esquire  
Deputy Attorney General  
820 N. French Street  
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Re: ***Burton v. Addus Home Health Care***  
C.A. No. 10A-04-001 RFS

*Upon Appeal of a Decision of the Unemployment Insurance  
Appeal Board. Affirmed.*

Submitted Date: October 26, 2010  
Decided Date: November 10, 2010

Dear Ms. Burton and Ms. Fortune:

This is my decision on Claimant Caroline Burton's appeal of a decision of the Unemployment Insurance Appeal Board ("Board"). The Board found that Claimant was discharged from her employment for just cause and was therefore ineligible to receive unemployment benefits. The Board's decision is affirmed.

**Facts.** Claimant worked as a Certified Nursing Aide (CNA) for Employer Addus Home Health Care on a part-time basis for approximately five years. In 1996, she was assigned to care for an elderly woman and her three developmentally disabled sons. The woman died in April 2006, and her husband died in December 2006. According to Claimant, she had an arrangement with the men's father, who was not in her care, that she would perform additional duties for approximately \$100 per week.

After the father's death, Claimant continued to perform extra duties for the three

brothers and keep the weekly \$100. The brothers' remaining relatives gave up their familial rights, and the brothers became wards of the State. James Reynolds, a licensed social worker, was appointed as the brothers' guardian to manage their financial matters and oversee their care. Every week the guardian sent a \$200 check to Claimant for the brothers' household expenses.

By Claimant's admission, she kept \$100 of each check as compensation for her additional duties. She asserts that the guardian had approved of the arrangement in a telephone call. There is no written confirmation of the arrangement.

When Employer hired new managers in 2009, Claimant's work came under scrutiny. According to Employer's director, Pam Tyranski, Claimant's file contained write-ups and warnings dating from February 2005. Tyranski gave Claimant a verbal warning on June 29, 2009. Claimant was advised that she should discontinue extra duties and keeping part of the weekly money. Claimant responded with a letter stating her intention to continue to perform the additional duties. Claimant was also warned about keeping her time sheets and financial records in the required format. She showed no improvement.

On July 6, 2009, Claimant received a final warning and was given a list of duties she could and could not perform.

In October 2009, Claimant was dispensing topical medicine to at least one of the brothers; she was not complying with Employer's policies on billing and documentation of her time; and she failed to document the additional duties she performed (such as buying furniture and rugs, doing errands other than those authorized, and cleaning the septic system).

On October 28, Tyranski met with Claimant because Claimant used one of the brothers' debit cards to pay for her own prescription. Tyranski reviewed Claimant's violations of company rules and terminated her employment. According to Tyranski, Claimant was discharged for three reasons: use of the debit card; falsification of time sheets; and practicing nursing without a license (in the form of dispensing medication). The guardian issued a follow-up letter confirming that Claimant had no permission from him to use the brothers' money for her own use.

Claimant filed for unemployment insurance benefits. At each level of the administrative process, it was determined that Claimant was terminated for just cause in connection with her work. After two hearings, the Board found that Claimant was terminated for just cause because she violated a reasonable and known company policy

(using the debit card for her own purposes) and that she performed duties outside the scope of her position as a CNA under 16 *Del. C.* § 3001A(1). Claimant was therefore ineligible to receive unemployment benefits.

**Standard of review.** On appeal from a Board decision, the Court's role is to determine whether the Board's conclusions are supported by substantial evidence and are free from legal error.<sup>1</sup> Substantial evidence means such relevant evidence as a reasonable person might accept as adequate to support a conclusion.<sup>2</sup> The Board weighs the credibility of witnesses and resolves conflicts in the testimony.<sup>3</sup> If there is substantial evidence and no legal error, the Court will affirm.<sup>4</sup>

**Discussion.** Claimant justifies using the debit card and doing extra duties by asserting that Employer was aware of her actions and failed to provide adequate care for the brothers.

Claimant's admissions provide substantial evidence to support the Board's finding of just cause, which the Board correctly defined as "wilful and wanton conduct [which] is. . . either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance."<sup>5</sup> The Board also correctly applied *McCoy v. Occidental Chemical Corp.*<sup>6</sup> to determine if termination for failure to follow a policy constitutes just cause. The Board found that Employer's rules prohibited unauthorized use of a client's property, providing client services for compensation and becoming involved in a client's personal affairs. The employee handbook was admitted into evidence, and as well as papers signed by Claimant indicating that she had received and understood the rules. The Board's findings are supported by substantial evidence and the decision is free from legal error. The Board was also correct in finding that Claimant

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<sup>1</sup>*Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del. Super. 1979).

<sup>2</sup>*Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

<sup>3</sup>*Starkey v. Unemployment Ins. Appeal Bd.*, 340 A.2d 165, 166 (Del. Super. 1975), *aff'd*, 364 A.2d 651 (Del. 1976).

<sup>4</sup>*Longobardi v. Unemployment Ins. Appeal Bd.*, 287 A.2d 690, 692 (Del. Super. 1971), *aff'd*, 293 A.2d 295 (Del. 1972).

<sup>5</sup>*MRPC Financial Management LLC v. Carter*, 2003 WL 21517977 (Del. Super.).

<sup>6</sup>1996 WL 111126 (Del. Super.).

was not authorized to administer even a topical medication. *See* 24 *Del. C.* § 1902(a), (m) and (n); 16 *Del. C.* § 3001A.

Claimant argues that Employer violated the privacy provisions of the Health Insurance Portability and Accountability Act (“HIPAA”), 42 USCA 1320d et seq., by calling the Rite Aid pharmacy to check on a debit card sale, thereby discovering that Claimant paid for her own prescription using one of the brothers’ debit cards. HIPAA was designed to promote cost efficiency in the sharing of information for medical purposes, while protecting the personal nature of stored medical information.<sup>7</sup> To invoke the privacy protections, Claimant must show that Rite Aid is a covered entity under HIPAA.<sup>8</sup> She has not done so, nor did she raise the issue below. This argument fails procedurally and on the merits.

Claimant argues for reversal because one of the Board members referred to the charges as being criminal in nature. The record shows that the Board’s attorney warned Claimant that his review of the file showed a “potential criminal liability.”<sup>9</sup> This statement is not grounds for reversal.

Claimant argues that Addus failed to submit to the Board or the Court all the evidence of money sent to her, which she had sent to Addus. The record contains numerous receipts, check stubs and related information. Moreover, the Board received the documents necessary to resolve the issue of Claimant’s use of the debit card.

Claimant alleges that one of her witnesses, a relative of the brothers, was sent a subpoena with the wrong date and therefore was not present at the Board hearing. Claimant argued below that the sister-in-law could testify that she approved of Claimant’s use of the brothers’ money, although the guardian was the only person who could make financial decisions. The Board granted a continuance so Claimant could seek enforcement of the subpoena in Superior Court.

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<sup>7</sup>*Merryfield v. Kansas Social and Rehabilitation Services*, 236 P.3d 528, 533 (Kan.Ct. App. 2010)(citing *United States v. Elliott*, 676 F. Supp.2d 431, 436-37 (D.Md.2009)).

<sup>8</sup>A “covered entity” means a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction for which the Department of Health and Human Services has adopted standards under the HIPAA. *See Holman v. Rasak*, 785 N.W. 2d 98, 102 (Mich. 2010).

<sup>9</sup>Record at 149.

At the second hearing, Claimant did not have another witness. Instead, she testified that she had mailed the Board documents from Employer regarding her use of the debit card and statements from the guardian approving Claimant's use of the weekly money. The Board never received these statements, and there was no evidence supporting these assertions.

Claimant argues that because Employer allowed her misconduct for several years, she cannot be terminated for it. The record shows that Claimant received warnings as early as 2005. Some of her conduct was unknown to Employer until later. Ms. Tynanski testified that the unauthorized use of the debit card was the final act demanding termination. This argument has no merit.

Claimant asserts that the Referee expressed bias against her by asking Employer's witness if use of the debit card was the straw that broke the camel's back. This phrase does not demonstrate bias.

For these reasons, the Court concludes that the Board's factual findings are supported by substantial evidence and that the decision is free from legal error.

The Board's decision is **AFFIRMED**.

**IT IS SO ORDERED.**

Very truly yours,

Richard F. Stokes

cc: Prothonotary